

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Department of Hawaiian Home Lands)	WC Docket No. 10-90
Request for Guidance Regarding Sandwich)	
Isles, Inc.'s Exclusive License Pursuant to)	CC Docket No. 96-45
Section 253(a) of the Communications Act)	

COMMENTS OF HAWAIIAN TELCOM, INC.

Hawaiian Telcom, Inc. ("HTI") has stated in various FCC proceedings in the past that the grant of an "exclusive license" to Sandwich Isles, Inc. ("SIC") is unlawful for a variety of reasons, including that it constitutes a violation of 47 U.S.C. § 253(a).¹ For a more complete legal analysis see Opposition of Hawaiian Telcom, Inc. to Petition for Expedited Study Area Waiver, CC Docket No. 96-45, 16-22 (filed, Mar. 4, 2013) (attached).

Respectfully submitted,

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February 20, 2017

¹ The FCC requested comments on the Department of Hawaiian Home Lands' request for guidance pursuant to Public Notice, DA 17-135 (rel. Feb. 6, 2017).

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
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Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
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Sandwich Isles Communications, Inc.)	
Petition for Waiver of the Definition of "Study Area" of)	
the Appendix–Glossary of Part 36 of the Commission's)	
Rules)	

**OPPOSITION OF HAWAIIAN TELCOM, INC.
TO PETITION FOR EXPEDITED STUDY AREA WAIVER**

March 4, 2013

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**OPPOSITION OF HAWAIIAN TELCOM, INC.
TO PETITION FOR EXPEDITED STUDY AREA WAIVER**

Hawaiian Telcom, Inc. (“HTI”), by its undersigned counsel, pursuant to the Public Notice (DA 13-110) issued by the Wireline Competition Bureau (“Bureau”) on February 1, 2013, hereby submits its Opposition to the Petition for Expedited Study Area Waiver (the “Petition”) filed with the Commission on November 29, 2012, by Sandwich Isles Communications, Inc. (“SIC”).

INTRODUCTION AND SUMMARY

The petition for waiver of study area boundaries filed by Sandwich Isles Communications, Inc. presents novel issues of fact, law, and policy. It is an unprecedented request that the Commission reassign lines served by one carrier to another carrier’s study area over the former’s objection. This extraordinary request seeks to eliminate wireline competition in portions of Hawaii, and appears to be an effort to evade the Commission’s recent decision to cap SIC’s eligibility for universal service subsidies. Further, HTI’s application for review of SIC’s previous study area waiver has been awaiting a decision by the full Commission for over seven years, and that decision could materially affect this modification proceeding. The Wireline Competition Bureau was wise to decline SIC’s request for streamlined treatment, and should refer the petition to the full Commission for decision in concert with the pending application for review.

SIC's "study area" is a patchwork quilt of scattered pieces of property on six different Hawaiian islands that were carved out of the pre-existing study area of HTI, the incumbent LEC serving Hawaii, over HTI's opposition. SIC's operations are based on its license agreement with the Department of Hawaiian Home Lands ("DHHL"), a State agency that owns various parcels of land throughout the State and leases this property both for commercial use and for residential and agricultural use by Native Hawaiians. SIC is currently operating under a Bureau waiver that defines its "study area" as those DHHL properties that SIC claimed were "unserved" in 1997.

SIC states that it serves about 3,000 telephone lines on DHHL properties, while up to 7,000 additional lines are served by "other carriers." The only "other carrier" it identifies by name is HTI and, as far as HTI knows, there is no other company providing wireline service on DHHL properties.

SIC has used its DHHL agreement and its study area waiver to build a duplicative telecommunications network that would be entirely infeasible without massive infusions of subsidies through the Universal Service Fund. In 2010, SIC was number 5 in the top-10 list of companies receiving the highest USF support per line, and (with only 2,068 lines) it received more dollars and served more lines than the other nine companies on the list combined. Even after the Commission's 2011 USF reforms, SIC is still receiving relatively huge high-cost support payments, yet claims it needs still more to remain viable.

This proceeding appears to be an effort by SIC to evade the high-cost support rules, for its own narrow benefit, at the expense of the public interest and telecommunications users nationwide. When the new USF caps are fully implemented, SIC's annual support would be limited to approximately \$9 million (3,000 lines X \$3,000/year/line), or less based on regression caps – in either case, a far cry from the \$25.6 million it received in 2010. SIC has so far been unwilling to provide the Bureau with sufficient information to justify the waiver of those caps it has requested. But SIC thinks it has found a loophole: if it could expand its study area by another 7,000 lines, it could increase the annual cap to \$30 million, even though those new lines are not directly eligible for any support.

There are two problems with this arrangement. First, SIC's abuse of high-cost funding to build a duplicative network (connecting various properties together where facilities already exist) would be no more in the public interest after this hypothetical expansion of the study area than it was before. Second, the additional lines that SIC needs to make the arrangement work are currently being served by HTI (although there are actually fewer than 7,000), without benefit of enormous USF subsidies. SIC claims it intends to "acquire" these additional lines, but it has made no offer to purchase them and HTI has not proposed to sell them. This seems to be where the DHHL "exclusive license" comes into play. The only way SIC's waiver request makes any sense is if it plans to use its DHHL agreement to force HTI into an involuntary sale of access lines that HTI has been serving for years or decades, thereby forcing HTI's satisfied customers to switch to SIC's network.

But SIC has no right, under either State or Federal law, to claim an "exclusive" right to serve residents of DHHL properties. Hawaii law prohibits exclusive certification of telecommunications carriers, and Section 253 would preempt any State law that purported to establish such exclusivity anyway. Moreover, this Commission's rules expressly prohibit a LEC such as SIC from entering into any "exclusive" contract with a landowner, such as DHHL, precluding competitors from access to tenants on the owner's property. In addition, any such "exclusive" contract would effectively deny residents and businesses the freedom to choose their telecommunications service provider and restrict their access to advanced telecommunications services that alternative providers may offer.

SIC's petition does not satisfy the Commission's public interest test for study area waivers, and should be denied. The proposal is directly contrary to the Commission's goal of consolidating study areas and realizing economies of scale; instead, it would move lines out of an existing large study area into a smaller, higher-cost study area. Moreover, it would unnecessarily drain the high-cost fund; would impair competition for wireline services in Hawaii; would force HTI customers to switch to SIC's services without their consent; and would not have any offset-

ting benefits, as HTI offers its customers residing on DHHL properties at least the same quality of service that SIC could hope to provide.

BACKGROUND

A. Properties Controlled by the Department of Hawaiian Home Lands

In 1921, Congress placed approximately 200,000 acres of federal-owned lands into a trust to be administered by the Hawaiian Homes Commission, a subdivision of the territorial government, for homesteading by native Hawaiians.¹ Upon Hawaii's admission to statehood in 1959, Congress transferred responsibility for the land trust to the Department of Hawaiian Home Lands (DHHL), a state governmental organization. DHHL has statutory control of and responsibility for management of the lands under its control. In particular, DHHL has authority "to grant licenses as easements for railroads, telephone lines, electric power and light lines, gas mains and the like."²

The property controlled by DHHL is made up today of about 203,500 acres of land located on six of the eight main Hawaiian Islands and consists of more than 70 non-contiguous parcels. Approximately 9,800 families currently reside on DHHL properties. Unlike distinct communities found on tribal reservations, the DHHL sites are separate and discrete tracts of land that can be urban or rural in nature.³ DHHL properties have no local self-government or sovereign status; their residents are citizens of Hawaii who participate in local and state government in the same way as their neighbors living on non-DHHL lands.

SIC states in its Petition that it serves approximately 3,000 lines on DHHL lands, Petition at 3, although its most recent line count report pursuant to 47 CFR § 36.611(h) showed 2,439 lines in its study area. SIC also states that "[t]o the best of SIC's knowledge, there is only one

¹ Hawaiian Homes Commission Act, Act of July 9, 1921, ch. 42, 42 Stat. 108 ("1920 Act").

² Section 207(c)(1), 1920 Act.

³ See Attachment A hereto, which demonstrates the diverse nature of the DHHL controlled properties.

other ILEC that provides service to other customers within the HHL, Hawaiian Telephone Company, Inc. [*sic*]” Petition at 3. It adds that “there are less than 7,000 telephone lines extant in the HHL that are not already served by SIC.” Petition at 9. Presumably this refers only to lines served by HTI. HTI does not have an exact count of its customers located on DHHL properties, since these lands do not form distinct communities or exchange areas; customers are listed in HTI’s records by their address, not by landlord or housing development. However, HTI estimates that it served approximately 8,000 lines in DHHL properties in 2003, and that due to line loss trends this number probably is less than 5,000 at present. Notably, this is still roughly twice as many lines as SIC serves on DHHL properties.

B. Hawaiian Telcom’s Authority to Provide Service throughout Hawaii, and SIC’s Authority

In 1883, the Kingdom of Hawaii granted HTI a Charter that authorizes it to provide telephone services to all areas of the State, including the property now controlled by DHHL. As a result, HTI continuously offered service throughout Hawaii for over a hundred years before SIC even received permission to provide services in certain portions of the properties controlled by the DHHL. DHHL granted SIC a license to construct and operate a telecommunications network on the property controlled by the DHHL in Hawaii on May 9, 1995. On November 14, 1997, the Hawaii PUC authorized SIC to provide telecommunications services in Hawaii on lands administered by DHHL. During that entire time, HTI served as the incumbent LEC for the state and was determined to be the “carrier of last resort” for all Hawaii residents, regardless of where they resided.

C. 1997 SIC waiver request

On July 8, 1997, SIC filed a petition requesting a waiver of section 36.611 of the Commission’s rules to enable it to receive immediately high-cost loop support based on projected

costs until historical costs became available.⁴ SIC stated that it was a new LEC that would be providing services to previously “unserved” property controlled by the DHHL. SIC also sought clarification or, to the extent necessary, waiver of the definition of incumbent LEC for purposes of calculating universal service support and Part 69 of the Commission’s rules. SIC further claimed that it was not required to seek a study area waiver because it was establishing a study area serving previously unserved areas.

After the comment period had closed but prior to a decision by the Commission, HTI (then known as GTE Hawaiian Telephone Company, Inc.) filed an opposition to SIC’s petition arguing that the areas SIC proposed to serve were not in fact “currently unserved” because they were within the serving territory of HTI’s central offices. Although some areas at the time did not have telephone service, HTI noted that other subdivisions were adjacent to areas already served by HTI. HTI also noted that the Hawaii PUC had designated HTI as the carrier of last resort and that it was obligated to provide service throughout the state to any resident who requested service until another carrier was designated as a carrier of last resort. SIC replied to HTI’s petition and stated that there was no overlap in service areas described in its petition between the property controlled by the DHHL and the areas then served by HTI. SIC also argued that HTI could not provide the service described in SIC’s petition because SIC had been granted an “exclusive license” to provide service to the property controlled by the DHHL.

On February 8, 1998, the Chief of the Accounting and Audits Division of the then-Common Carrier Bureau granted in large part SIC’s petition. Specifically, the Bureau stated that because SIC “will provide service to previously unserved areas, we find that the special circumstances warranting the grant of a waiver of the Commission’s rules are present and that it is in the public interest to grant [SIC’s] request for a waiver of Section 36.611 of the Commission’s

⁴ *Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Commission’s Rules and Request for Clarification*, AAD 97-82 (July 8, 1997).

rules.”⁵ By granting SIC’s waiver request, the Bureau permitted SIC to receive high-cost loop support for the period January 1, 1998, through December 31, 1999, to be based initially on projected costs followed by quarterly true-ups using actual costs. The Bureau further concluded that although SIC did not meet the statutory definition of an incumbent LEC (necessary to be a member of NECA and to participate in its tariffs), SIC would be the “sole provider of service to the area” and was, therefore, not a competitive LEC.⁶ Accordingly, the Bureau waived certain incumbent LEC requirements and permitted SIC to become a member of NECA and to participate in NECA pools and tariffs.⁷ The Bureau also recognized SIC’s service territory as a “study area” for regulatory purposes.⁸

On March 5, 1998, HTI filed an Application for Review of the Bureau’s decision, making essentially the same arguments that had not been considered by the Bureau in its order. SIC opposed HTI’s request.

D. 2004 Commission reversal of Bureau order

On October 29, 2004, the Commission granted HTI’s Application for Review of the Bureau’s decision granting SIC a waiver to be treated as an incumbent LEC serving a previously unserved area for purposes of receiving high-cost universal service support. The Commission concluded that the Bureau erred by ignoring evidence in the record that the areas SIC proposed to serve were not unserved.⁹ As a result, the Commission required that SIC seek and obtain a

⁵ *Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Commission’s Rules and Request for Clarification*, Order, AAD 97-82, 13 FCC Rcd 2407, 2411 (CCB 1998).

⁶ 13 FCC Rcd at 2412.

⁷ 13 FCC Rcd at 2413.

⁸ *Id.*

⁹ *GTE Hawaiian Telephone Company, Inc., Application for Review of a Decision by the Common Carrier Bureau*, Memorandum Opinion and Order, AAD 97-82, 19 FCC Rcd 22268 (2004).

study area waiver to be treated as an incumbent LEC for purposes of receiving universal service support.

In its order, the Commission determined that the Bureau did not question SIC's claim that it would be providing service to previously unserved rural areas. Specifically, HTI had raised important facts with respect to those claims and that the proposed areas were served by its central offices.

The Commission found that the exchanges served by SIC in 2004 were within the HTI study area. The Hawaii PUC had designated HTI as an eligible telecommunications carrier for the State of Hawaii, effective January 1, 1998. The Bureau's later conclusion that the property controlled by DHHL was eligible for support resulted in the creation of a "high-cost" area that was previously within the study area of HTI and therefore had the effect of placing a new burden on the federal universal service fund.¹⁰ The Commission concluded that by requiring SIC to seek a study area waiver, the Commission would have the opportunity to consider whether creating a high-cost study area in Hawaii would have an adverse effect on the universal service fund and whether it would serve the public interest.

E. 2005 Bureau decision granting SIC study area

On December 27, 2004, SIC requested a study area waiver consistent with the Commission's order. The Wireline Competition Bureau granted this waiver in part on May 16, 2005, and granted SIC's waiver of the definition of incumbent LEC to the limited extent necessary to permit SIC to receive universal service support based on its own costs.¹¹ The Bureau found, however, that the study area granted by its order was limited only to those areas where there were no facilities or services on the properties controlled by the DHHL in 1997 – that is, the

¹⁰ 19 FCC Rcd at 22272.

¹¹ *Sandwich Isles Communications, Inc., Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary and Sections 36.611, and 69.2(hh) of the Commission's Rules*, Order, CC Dkt. No. 96-45, 20 FCC Rcd 8999 (WCB 2005) ("2005 Waiver Order").

areas that SIC claimed were unserved in its 1997 petition. The Bureau concluded that both its prior 1998 order and the Commission's 2004 order were limited to those areas. "In fact, had Sandwich Isle's original 1997 Petition included areas actually served by another carrier, that would likely have affected the outcome of the Bureau order and all subsequent Commission actions."¹²

The Bureau further concluded that the portion of the property controlled by the DHHL that fell outside of the scope of the study area "appeared" to be less than one percent of the property controlled by the DHHL.¹³ HTI had disputed SIC's claim that the property controlled by the DHHL would have remained unserved if it were not for SIC, and claimed that HTI was ready, willing, and able to provide services when the Bureau granted SIC's initial petition in 1998. The Bureau concluded, however, that although HTI may have had authority to serve the property controlled by the DHHL, that did not demonstrate that it was not in the public interest to grant a study area waiver to SIC. The Bureau also stated, "[t]he record reflects that, at least in the 1990s, [HTI] was not providing service to residents, or was at best providing multi-party service" to the property controlled by the DHHL.¹⁴

HTI filed an Application for Review of the Bureau's decision on June 15, 2005, that remains pending over seven years later.¹⁵ At the heart of its request, HTI argued that the Bureau had repeated the same error committed in its 1998 decision – that facts material to the Bureau's decision were ignored, specifically that the record demonstrated that HTI already provided

¹² 20 FCC Rcd at 9007.

¹³ *Id.* This is because the vast majority of the DHHL land was, and still is, entirely undeveloped. However, the areas served by HTI in 1997 included most of the developed portions of DHHL land.

¹⁴ 20 FCC at 9008.

¹⁵ *Sandwich Isles Communications, Inc., Petition for Waiver of Definition of "Study Area" Contained in Part 36, Appendix-Glossary and Sections 36.611, and 69.2(hh) of the Commission's Rules*, Hawaiian Telcom Communications, Inc. Application for Review, CC Dkt. No. 96-45 (filed June 15, 2005) ("Hawaiian Tel's Second Application for Review").

service to customers on the properties controlled by the DHHL. HTI also noted that both under state and federal law, HTI was under an obligation, *as it is today*, to provide service upon request to any resident on the properties controlled by the DHHL.¹⁶

F. 2011 Request for Waiver of Limits on High-Cost USF Recovery

In the *USF/ICC Transformation Order*, the Commission established a \$250 per line per month limit on high-cost universal service support as part of its fiscally responsible reform of the high-cost fund and mandated that the limit be phased in over three years.¹⁷ The Commission permitted affected carriers to seek a waiver of that restriction by providing specific information in its petition and required any requesting carrier to provide additional information as requested by staff. On December 30, 2011, SIC filed such a request, arguing that absent a waiver the rules would result in a significant reduction in revenue to SIC and result in residents of property controlled by DHHL to no longer be assured of continuation of voice and broadband service.¹⁸ In its petition, SIC argued that there was “no reasonable expectation that an alternative provider will replace” SIC services on the properties controlled by DHHL.¹⁹ This is despite the fact that HTI currently serves roughly twice as many customers on those same properties. SIC’s waiver request remains pending.

G. SIC Limited Customer Base and High-Cost Support

From 2010 until today, SIC has increased the number of working lines it provides service to customers located within its “study area” from 2,068 to 2,439. For its services to these 2,439 lines, SIC will receive \$925 per loop per month on average for the first two quarters of 2013 from governmental fund support, or slightly over \$27 million on an annualized basis. The

¹⁶ *Hawaiian Tel’s Second Application for Review*, p. 9.

¹⁷ *Connect America Fund*, WC Docket No. 10-90, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17842 (2011) (“*USF/ICC Transformation Order*”).

¹⁸ *Connect America Fund*, Sandwich Isles Communications, Inc., Petition for Waiver of 47 C.F.R. 54.302, p.3 (filed Dec. 30, 2011) (*Connect America Waiver Petition*).

¹⁹ *Connect America Waiver Petition*, p. 5.

support amount for the second two quarters will be lower, as the support limit is phased in, unless the Commission were to grant SIC's pending request to modify that limit.

HTI, the "only other ILEC" serving lines in the properties controlled by the DHHL, does not receive such generous support, despite the high cost of providing service on the islands other than Oahu.²⁰ SIC acknowledges that less than 7,000 lines are served by other carriers in the DHHL controlled properties (*i.e.*, HTI),²¹ despite SIC being the "exclusive" provider of services. Should SIC obtain the authority to expand its study area so that it may acquire HTI's service lines on DHHL property, then SIC will expand the number of lines that it requests government support to provide service and impose additional costs on governmental funding sources.

H. Hawaiian Telcom's Current Services and Modernization Program

HTI is serving and intends to continue to serve its customers living and operating businesses on property controlled by DHHL. In fact, Hawaiian Telcom is investing and upgrading its network to provide its next generation fiber network offering home phone, Internet, long distance, wireless and IP TV services²² to current customers located on DHHL properties at competitive prices. These upgrades have also allowed Hawaiian Telcom to offer its newest IP business services including Routed Network Services, Enhanced IP Data Services, and Business All In One IP VoIP service. Customers also have access to all the traditional TDM business services such as T1, SONET OC-n, and other high bandwidth offerings. If permitted to do so, Hawaiian Telcom is prepared to extend these same services to residents and business on other developed DHHL properties. Moreover, HTI's network upgrades will benefit Native Hawaiians living throughout the State, not just the relative few living on DHHL developments.

²⁰ HTI, which serves approximately 398,000 lines throughout Hawaii, receives nominal Connect America Fund support of \$164,068 per month; that is, about \$2 million per year, or less than 50 cents per line per month.

²¹ *Sandwich Isles Communications, Inc., Petition for Waiver of the Definition of "Study Area" of the Appendix-Glossary of Part 36 of the Commission's Rules*, Petition for Expedited Study Area Waiver, CC Dkt. No. 96-45, p. 5 (Nov. 29, 2012)

²² Where available.

Because much of the property controlled by the DHHL is adjacent to or surrounded by existing HTI facilities, many residents on DHHL land can immediately benefit from the network upgrades HTI is actively making throughout its network. For example, HTI is expanding its fiber based IP network deep into residential and business neighborhoods creating a scalable bandwidth network that will meet all current and future needs. In 2013, HTI plans to deploy nearly 100 new fiber miles. The breadth and resiliency of HTI's network can readily be expanded into the properties controlled by DHHL, and would provide residents and businesses alike competitive service choices and prices on highly reliable networks.

As easily seen in Hawaii and throughout the nation, providing customers a choice of providers has kept prices low and opened a wide range of services and investment in those neighborhoods. The most recent example of this has been the introduction of IP TV service by Hawaiian Telcom in a market once monopolized by Oceanic Time Warner Cable. In areas that this service has been launched, consumer TV prices have dropped dramatically while investment in new infrastructure has increased.

I. The Current SIC Petition

The instant Petition seeks a modification of SIC's study area boundary to include all DHHL lands. Since the 2005 Bureau waiver order defined SIC's study area as comprising those DHHL properties that SIC claimed were not being served in 1997, this proceeding by definition concerns all DHHL properties that *were being served* by HTI in 1997, and where HTI continues to provide service today.

ARGUMENT

A. SIC'S Petition Presents Novel Issues of Fact, Law, and Policy

SIC's Petition is literally unprecedented, as it asks the Commission to do something it has never done before: order the *unilateral* expansion of a study area to incorporate lines in another carrier's study area that the other carrier is currently serving. HTI is unaware of *any* previous case in which the Commission has modified one carrier's study area to include lines that a

different carrier is serving and wishes to continue to serve, without the latter's consent.²³ Indeed, the only previous case in which a study area was carved out of an existing study area without the incumbent's agreement was the 2005 waiver granted to SIC, as to which HTI's Application for Review is still pending after over seven years. There is no Commission precedent to guide the Bureau in assessing whether it is in the public interest to use a study area waiver as a method to encourage, or perhaps force, an incumbent LEC to abandon part of its existing customer base. And the Commission still has provided no guidance on the policy issues raised in HTI's Application for Review, many of which are equally applicable to this Petition.

Further, SIC's Petition is novel in that, contrary to the Nationwide policy adopted in the Telecommunications Act of 1996 to promote competition in telecommunications markets, it is premised explicitly on seeking to *eliminate* competition to serve residents of DHHL properties, based on SIC's purportedly "exclusive" license. As discussed in Section C, below, SIC's claim to exclusivity is legally untenable. However, there is no precedent to guide the Bureau in deciding whether to give any weight to SIC's license terms in determining whether to modify a study area boundary.

The Petition also presents unprecedented issues regarding the application of the recently modified high-cost support rules in the event that SIC's study area were expanded. As discussed in Section B, below, it is unclear how the high-cost loop support caps and the total high-cost support cap would apply to new lines that SIC might acquire, or whether the result depends on *how* SIC acquires such new lines. Conceivably, depending on how the Commission interprets these rules, expansion of the study area could result in (yet another) unjustified subsidy windfall for SIC, diverting funds that could be used more effectively elsewhere including Hawaii.

²³ SIC claims that "The facts and circumstances supporting grant [of its Petition] are similar in material respects to those involved in waiver requests that have previously been approved by the FCC." Petition at 2 & n.3. This is plainly untrue, as *every case* cited by SIC as precedent in its own Petition involved a consensual transfer of exchanges.

In light of all these highly unusual and unprecedented implications of SIC's Petition, SIC's attempt to paint its filing as a "routine" waiver that should receive streamlined treatment was questionable at best, and the Bureau acted prudently and appropriately in refusing to be taken in by this claim. Indeed, the Bureau should now recognize that the Petition presents "novel questions of fact, law or policy which cannot be resolved under outstanding precedents and guidelines," 47 CFR § 0.291(a)(2), and should therefore refer the Petition to the full Commission for decision rather than acting on delegated authority. This will enable the Commission to resolve the still-open questions raised by HTI's long-pending Application for Review at the same time as it considers SIC's new waiver request.

B. SIC May Be Attempting to Evade the High-Cost Support Caps

In the *USF/ICC Transformation Order*, the Commission adopted two caps on high-cost support that directly affect SIC. One rule caps high-cost loop support, based on a regression formula; the other caps total high-cost support at \$3,000 per line per year.²⁴ Because the rules governing these caps are somewhat ambiguous, and SIC has been vague about its intentions, it appears that SIC's Petition may be an attempt to find and exploit loopholes in these caps, allowing it to evade the Commission's clear intent to limit the high-cost support flowing to "outlier" companies like SIC.

SIC attempts to brush off any concern about the impact of its request on high-cost support by pointing to Section 54.305 of the Commission's rules, which limits the amount of support payable to a "carrier that acquires telephone exchanges[.]"²⁵ However, SIC is not

²⁴ *USF/ICC Transformation Order*, ¶¶ 210-226, 272-279.

²⁵ SIC contradicts itself by claiming that Section 54.305(b) will prevent it from receiving additional high-cost support for acquired lines, Petition at 9, but then requesting a "[w]aiver of Sections 36.611 and 36.612 of the FCC's Rules [to] enable SIC to receive immediate high-cost loop support payments based on projected costs until historical costs become available for the acquired lines." Petition at 12. The latter request would be unnecessary if SIC did not believe it could become eligible for additional support.

proposing to acquire any “telephone exchanges” from HTI.²⁶ HTI does not have separate exchange areas or switching facilities dedicated to serving customers who happen to reside on DHHL properties. These customers are served by the same telephone exchanges that serve the rest of their communities, including their neighbors living on non-DHHL properties. At most, SIC can hope to detach some individual lines from HTI’s exchanges and attach them to its own exchanges (although, as discussed in Section D below, exactly how it expects this to happen is murky). Absent a clarification by the Commission, it is uncertain whether Section 54.305 would apply at all in this situation.

But even assuming the Commission interprets Section 54.305(b) as applying in this case, that rule only would limit the support payable with respect to the acquired “exchanges” – it would not limit support payable to SIC with respect to its existing lines. And the Section 54.302 cap, by its terms, is applied only *after* computing the sum of all forms of support available under the high-cost rules, including support under Section 54.305. *See* 47 CFR § 54.302(b). Suppose, for the sake of simplicity, that SIC currently serves 2,500 lines and that its uncapped “universal service support” for purposes of rule 54.302(b) would be \$30,000,000 per year. The cap, once fully phased in as of July 1, 2014, would limit SIC’s support to \$7,500,000 per year (2,500 lines X \$250 per month X 12 months). Now suppose that SIC “acquires” 5,000 additional lines that are currently in HTI’s study area, and that it is entitled to no additional support for these lines. This means that its “universal service support” amount would still be \$30,000,000, but the cap would increase to \$22,500,000 (7,500 lines X \$250 per month X 12 months).²⁷ Far from having “no adverse impact” on the Universal Service Fund, as SIC asserts (Petition at 9), this would

²⁶ “[A] ‘local exchange[]’ is a network connecting terminals like telephones, faxes, and modems to other terminals within a geographical area like a city.” *Verizon Comms. v. FCC*, 535 U.S. 467, 489 (2002).

²⁷ Section 54.302(b) provides that “[l]ine counts for purposes of this section shall be as of the most recent line counts reported pursuant to § 36.611(h) of this chapter.” Thus, SIC’s line count would include “acquired” lines, not just those lines it was serving in its study area as originally defined.

result in a massive increase (200% in this example) in its subsidy payments.²⁸ Because the Commission has imposed an annual budget on the high-cost program, this increase in payments to SIC would result, at some point, in reduced payments to other recipients nationwide, including other Hawaii recipients, and could impair their ability to provide universal voice and broadband services to their own customers.

C. SIC's Claimed "Exclusive" Right to Serve DHHL's Tenants Does Not Exist

SIC expressly states that its Petition is premised upon its supposedly "exclusive" license to provide telephone service to tenants on DHHL properties. SIC confuses the issue by representing a "license" that is in the nature of a franchise authorizing occupancy of rights-of-way as if it were equivalent to a state certification of public convenience, which it is not. DHHL has no power to authorize or to regulate public utilities in Hawaii, and by State law there is no such thing as an "exclusive" right to provide public utility service. Even if the State purported to create such a right, it would violate both Federal law and Commission rules.

Because SIC claims to be acting to effectuate its "exclusive" license, it is crucial that the Commission examine that license and make its own conclusions about its effects in this proceeding. As discussed below, HTI is concerned that SIC seeks to use the requested study area modification as a lever to force HTI either to sell or to abandon its existing facilities serving tenants on DHHL properties. The Commission should be cautious of taking any steps that might be used by SIC for anti-competitive purposes.

1. Hawaii Has Not Granted SIC an Exclusive Right to Operate as a Public Utility on DHHL Properties

DHHL is not a regulatory agency, and has no power to issue exclusive licenses, or indeed any licenses at all, in the sense that SIC uses the word, to entities seeking to provide telecommu-

²⁸ A similar problem affects the calculation of high-cost loop support caps under rule 36.621(a)(5), because the number of loops served is one of the factors in the regression formula used to determine those caps. The computation of the actual effect on the Fund, however, is much more complex.

nications services on DHHL lands. None of the provisions of the Hawaiian Homes Commission Act of 1920 purports to grant DHHL the power to regulate utility services on its properties. Nor does the 1920 Act empower DHHL to issue any exclusive privilege or license to a telecommunications provider and thereby create a telecommunications monopoly on its properties.

The only state agency that has the authority to issue licenses to provide telecommunications services in Hawaii is the Hawaii PUC, and that authority encompasses all parts of Hawaii, including the Hawaiian Home Lands. Chapter 269 of the Hawaii Revised Statutes clearly provides that the Hawaii PUC “shall have the general supervision hereinafter set forth over *all public utilities*.” HRS Section 269-6 (emphasis added).²⁹ Moreover, “public utilities” are specifically defined as “every person who may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, any plant or equipment, or any part thereof, directly or indirectly for public use, for the ... conveyance or transmission of telecommunications messages, or the furnishing or facilities for the transmission of intelligence by electricity by land or water or air *within the State or between points within the State*” HRS Section 269-1 (emphasis added). This language does not distinguish between utility providers operating within the Hawaiian Home Lands and those providers who operate outside the Hawaiian Home Lands. In fact, SIC sought approval by the Hawaii PUC to provide telecommunications service in the Hawaiian Home Lands, which was granted on November 14, 1997, in Order No. 16078.

Nowhere in that order did the Hawaii PUC designate SIC as the exclusive telecommunications carrier for the Hawaiian Home Lands. This is controlling, since Section 6-80-18(e) of the Hawaii Administrative Rules states that “unless otherwise ordered by the Commission, no COA [Certificate of Authority] or COR [Certificate of Registration] issued by the Commission to any telecommunications carrier may be construed as granting a monopoly or exclusive privilege, franchise, or charter for the provision of telecommunications service.” The Hawaii PUC has

²⁹ Thus, the Hawaii PUC is the only “State commission” for Hawaii as defined in 47 U.S.C. § 153(48), and the DHHL is not a “State commission.”

issued COAs to numerous carriers, such as AT&T and Sprint, and none of these COAs prohibits the recipients from providing telecommunications services in the Hawaiian Home Lands. Nor is there any constitutional or statutory language or Hawaii PUC order that modifies the statewide franchise that HTI received under its Charter from the Kingdom of Hawaii in 1883 to exclude service to the Hawaiian Home Lands. Moreover, the Hawaii PUC's 1997 order approving HTI's application for designation as an eligible telecommunications carrier under section 214(e) of the Act specifically stated that such designation applied statewide.

To be sure, DHHL does have statutory authority to control access to its property. Section 207(c)(1) of the 1920 Act provides, "The department is authorized to grant licenses *as easements* for railroads, telephone lines, electric power and light lines, gas mains, and the like." (Emphasis supplied.) Thus, the "license" granted by DHHL to SIC is properly viewed as being in the nature of an easement, and may be analogized to a municipal franchise authorizing a telephone company to place its facilities on municipally-owned lands and rights-of-way, or to an easement granted by a private landowner. As shown in the following sections, however, any attempt by the State of Hawaii to bar SIC's competitors from access to these properties would violate Federal law.

2. Any Attempt by Hawaii to Enforce SIC's Purported "Exclusive" Rights Would Violate Federal Law

The Telecommunications Act of 1996 ("Act") established an explicit National policy of promoting competition in both interstate and intrastate communications markets. Section 253(a) of the Act, in particular, specifically pre-empts any State or local law or "legal requirement" that prohibits or has the "effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a).

Although Section 253(c) of the Act states that "[n]othing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications carriers," that authority must be exercised "on a competitively neutral and nondiscriminatory basis." 47 U.S.C. § 253(c). DHHL's action

here has been neither. DHHL has granted exclusive licenses to SIC to provide service to customers in new housing developments on its properties and has repeatedly expressed its intention to exclude HTI from these developments. Clearly, the so-called exclusive license that DHHL has granted SIC is a “legal requirement” that “may prohibit or have the effect of prohibiting” the ability of HTI to provide an interstate or intrastate telecommunications service. *See* 47 U.S.C. § 253(a).

This is the type of outright prohibition on entry that the Commission has not hesitated to pre-empt in the past. For example, in *Classic Telephone*, the Commission preempted a city’s decision not to grant a local franchise to a telecommunications carrier because the city did not “want to see two telephone companies ... competing side by side, in a situation that will be financially uneconomic for either company.” *Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief*, 11 FCC Rcd 13082, ¶ 26 (1996) (“*Classic Telephone*”). The Commission found that “[t]his absolute prohibition on Classic’s competitive entry is precisely the type of action Congress intended to proscribe under section 253(a) ...” *Id.*, ¶ 27. Similarly, in the *New England Decision*, the Commission preempted a state commission decision that precluded independent payphone providers from offering interstate and intrastate payphone services in Connecticut. *See New England Public Communications Council Petition for Preemption Pursuant to Section 253*, 11 FCC Rcd 19713, ¶ 18 (1996) (“*New England Decision*”).

Nor has the Commission allowed a state regulatory authority to impose discriminatory barriers to entry through its power to manage rights-of-way. For example, the Commission denied a petition by the State of Minnesota for a declaratory ruling that its grant of an exclusive right-of-way along Minnesota’s interstate freeway system to a company that had committed to construct fiber optic transport was consistent with Section 253 of the Act. *See Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, 14 FCC Rcd 21697 (1999) (“*Minnesota Decision*”). The State had granted the company exclusive physical access to the rights-of-way in return for a commitment to provide the State with a

portion of that capacity for use in carrying state government communications. *See id.*, ¶ 1. The Commission found that “the State’s action, effectively granting an exclusive license to Developer, appears fundamentally inconsistent with the primary goal of the Telecommunications Act of 1996, to replace exclusivity with competition.” *Id.*, ¶ 4. The Commission rejected the argument that this arrangement was protected by section 253(b), which preserves from preemption state or local requirements that are “competitively neutral” and “necessary” to achieve universal service and public interest objectives. The Commission found that “the Agreement is not competitively neutral because it grants a single entity, the Developer, exclusive physical access to the valuable freeway rights-of-way.” *Id.*, ¶ 52. The Commission also rejected the argument that this arrangement was protected from preemption under section 253(c), finding that the agreement with the developer was not “competitively neutral and nondiscriminatory,” as the State had “granted exclusive physical access to this right-of-way to a single entity for valuable consideration.” *Id.*, ¶¶ 60, 61.

DHHL’s grant of an exclusive license to SIC fails for the same reasons. It is a clear of Section 253(a), because it expressly prohibits HTI from providing interstate and intrastate telecommunications services to customers in the Hawaiian Home Lands. As in the case of Minnesota, there was a *quid pro quo* – DHHL granted SIC an exclusive license in return for SIC bearing the costs of building infrastructure for which DHHL would otherwise be responsible. This type of arrangement is not protected by section 251(b) or by section 251(c), because it is not competitively neutral or nondiscriminatory. It allows entry by only one carrier – SIC – and it prohibits competition by anyone else. This is precisely the type of prohibition of competition that section 253 was designed to address.

In addition, any “exclusive” contract would effectively deny residents and business the freedom to choose their telecommunications service provider and put them at a disadvantage compared to other consumers in Hawaii in terms of the breadth of services and competitive pricing available to them, which normally results when there is more than a single provider of a service. For example, in areas of Hawaii where Hawaiian Telcom has launched IP TV service,

consumer TV prices have dropped dramatically, while investment in new infrastructure capable of providing advanced services has increased.

HTI acknowledges that this is not a Section 253 proceeding, and that in 2005 the Bureau declined to consider whether SIC's alleged exclusivity violated Federal law.³⁰ As stated in its Application for Review, HTI believes the Bureau's decision in that case was in error. Regardless of that, this case is different because HTI is not putting SIC's license claims in issue – SIC itself has done that. SIC claims that “a grant of this waiver request, to include all of the HHLs within SIC's study area, would be consistent with and is essentially required under Hawaii law.”³¹ The Commission therefore must evaluate this claim, and whether any such Hawaii law (if it existed) would be pre-empted by the Act, in order to determine whether SIC's request is in the public interest.

3. DHHL's Exclusive Agreement with SIC Also Violates Commission Rules

Even if DHHL were not viewed as a State actor, but simply as a private landowner, its agreement to grant SIC exclusive access to its property developments would violate Commission rules that expressly prohibit any common carrier from entering into any arrangement for exclusive access to any commercial or residential multiunit premises. 47 CFR § 64.2500–2501. When DHHL develops property, it is authorized by law only to grant long-term leases for the land, and may not sell it.³² The Native Hawaiian residents of these properties are DHHL's tenants, and thus each of these residential developments is a “multiunit premises” as defined in rule 64.2501: “any contiguous area under common ownership or control that contains two or more distinct units.” When DHHL leases portions of its land for commercial use, these developments are

³⁰ 2005 Waiver Order, ¶ 23.

³¹ Petition at 4.

³² 1920 Act, *supra*, § 204(a)(2), prohibits DHHL from disposing of any land in fee simple with exceptions not relevant here, and § 207 specifically provides for leasing of residential properties to Native Hawaiians.

commercial multiunit premises. In either case, rule 64.2500 prohibits SIC from entering into or seeking to enforce any exclusive right of access to these properties. It necessarily follows that SIC cannot rely on such an invalid and unenforceable agreement as part of its “public interest” justification for seeking a study area waiver.

D. SIC’s Intent to “Acquire” Lines Should Raise Concern

SIC claims that the boundary waiver it seeks is necessary to permit it to “acquire any third party carrier lines or exchanges within the HHL[.]”³³ This is odd, because HTI is not aware of any lines or “exchanges” other than HTI’s that would fit this description, but HTI has received no offer from SIC to acquire any assets.

The Commission may rightly wonder how SIC intends to “acquire” lines within the proposed expanded study area without even initiating any negotiations. Normally, the Commission is asked to approve a study area waiver *after* two companies have agreed on a sale of assets or other transaction.³⁴ SIC apparently is the *only* carrier in the United States, since the study area freeze rule was adopted in 1984, to consider a boundary waiver to be a “necessary regulatory predicate”³⁵ before making an offer to acquire another company’s lines. Every other company

³³ Petition at 1.

³⁴ See, e.g., *Dickey Rural Telephone Cooperative, et al. and Citizens Telecommunications Company of North Dakota, Joint Petition for Waiver*, 17 FCC Red 16881 (Wir. Comp. Bur. 2002), *Saddleback Communications and Qwest Corporation*, Order, 16 FCC Red 21159, 21166 (Acc. Pol. Div. 2001), *Petition for Waivers Filed by Baltic Telecom Cooperative, Inc., et al.*, 12 FCC Red 2433 (Acc. Aud. Div. 1997), and *Alltel Corporation Petition for Waiver*, 5 FCC Red 7505 (Com. Carr. Bur. 1990) (“*Alltel Waiver*”); all of which were cited by SIC itself in its Petition. Even the rare waiver requests involving a previously unserved area within an existing study area have always been filed with the consent of the former incumbent. See *M&L Enterprises, Inc., d/b/a Skyline Telephone Company*, 19 FCC Rcd 6761, ¶ 5 (2004); *Qwest Corp., Pine Telephone Systems, Inc., and Oregon Telephone Corp.*, 24 FCC Rcd 4986 (Wir. Comp. Bur. 2009).

³⁵ Petition at 1.

has considered an agreement on terms of such a transaction to be the necessary predicate to requesting a waiver.³⁶

HTI fears that SIC may be seeking to use the expansion of its study area as an opportunity to enforce (illegally) the invalid exclusivity clause of its DHHL agreement, and force HTI into an involuntary sale or abandonment of facilities it is now using to serve its customers on DHHL properties. Because of the ambiguous language of the Petition, HTI cannot discern SIC's actual intent, but is concerned that it may be planning, either on its own or in collaboration with DHHL, some kind of action in Hawaii to bar HTI from continuing to operate its facilities on DHHL lands. If SIC were able to take such action under State law, and the Commission did not intervene, it could leave HTI unable to continue to serve its customers. Under those circumstances, it is highly unlikely that SIC would offer HTI the fair market value of facilities that HTI was no longer able to use. In short, there is a danger that SIC may be trying to enlist the Commission as its accessory in a scheme to force a "fire sale" of HTI's facilities, or perhaps even a seizure of those facilities without compensation, thereby allowing SIC to "acquire" additional lines at the expense of HTI and its local ratepayers.

Such an arrangement would be contrary to Federal law and Commission policies, as explained in Section C, and would be contrary to the interests of HTI's existing customers on DHHL properties. The Commission should require SIC to explain in more detail what lines or other facilities it plans to "acquire" if its study area is expanded, and how it plans to go about "acquiring" them, before the Commission even considers granting the requested waiver.

³⁶ SIC claims that its petition should be approved because "the Commission has recognized that changes 'that result from the purchase or sale of exchanges in arms-length transactions' do not necessarily raise the concerns which prompted the freeze." Petition at 6, *quoting Alltel Waiver*, ¶ 7. It seems clear that, whatever SIC is planning, it is far from a "purchase ... of exchanges in [an] arms-length transaction[.]"

E. SIC's Waiver Request Is Not in the Public Interest

SIC argues that its waiver should be granted under the revised two-part waiver standard discussed in the *USF/ICC Transformation Order*, ¶ 265. Petition at 4-5. The first part of the standard is that “the state commission having regulatory authority *over the transferred exchanges* does not object to the transfer” *USF/ICC Transformation Order*, ¶ 265, emphasis supplied). SIC suggests that DHHL is the relevant “state commission,” Petition at 6-8, but as shown in Section C.1, above, that is incorrect. Only the Hawaii PUC has regulatory authority over the “transferred exchanges,” which are the lines that HTI is currently serving on DHHL property.

Under the second part of the standard, SIC must show that the requested waiver is in the public interest. Although the Commission listed a number of criteria that would be considered in “routine” public interest reviews, it “stress[ed] that these guidelines are only guidelines and not rigid measures for evaluating a petition for study area waiver.” *USF/ICC Transformation Order*, ¶ 265. Since the guidelines were prepared in contemplation of the usual type of consensual post-transaction waiver requests previously reviewed by the Commission, it is not surprising that the guidelines provide little real guidance for the type of relief sought by SIC.

Although SIC claims that its waiver request satisfies all three non-binding guidelines, this is not so clear. First, the “number of lines at issue” is small according to SIC, Petition at 5, but in fact the number of lines that HTI now serves on DHHL properties is about twice the number that SIC serves. Granting the Petition could potentially *triple* the number of lines in SIC’s study area, which is not a small change at all. Second, although SIC claims that “the projected universal service fund costs per line will be in line with costs that typically apply to services offered in insular areas,” *id.*, it is not at all clear what this means. As shown in Section B, above, SIC has contradicted itself on whether it expects to qualify for additional high-cost support as a result of this Petition, and it could potentially *triple* the amount it is eligible to receive in such support under the new rules. Third, SIC argues that a grant of this waiver will facilitate the overall reduction of costs by taking advantage of economies of scale, that is, reduction in per line costs due to the addition of lines to SIC's established telephone network.” *Id.* This claim ignores the

greater economies of scale of HTI's state-wide network. SIC's Petition seeks to remove lines from the relatively lower-cost, more efficient HTI network and instead add them to the smaller, less efficient, more-costly SIC network, with the difference in cost to be supplied through USF payments. This is the exact opposite of what the Commission intended by encouraging the "consolidation of study areas[.]" *USF/ICC Transformation Order*, ¶ 265. SIC is not seeking to consolidate study areas but to whittle away bits of HTI's study area one slice at a time.

In any case, given the unique circumstances of this Petition as discussed in the previous sections, the Commission's public interest determination must take into account the full context of SIC's request, rather than focus narrowly on the three non-binding guidelines. Plainly, the requested waiver is not in the interest of customers who are satisfied with HTI's existing and planned services. As noted earlier, HTI continues to invest and upgrade its facilities on DHHL property to its next generation fiber network offering advanced residential and business services to current customers on those properties at competitive prices. SIC is free to offer its competing services to these customers today as a CLEC,³⁷ even without a study area waiver, so the waiver is not necessary to give customers the opportunity to use SIC as their telecommunications company if they wish to do so. Clearly, the only real purpose of the waiver (besides increasing SIC's subsidy payments) would be to *deny* these customers the choice they currently have, by forcing HTI to discontinue serving them, which is not in the public interest.

As HTI has shown in this Opposition, SIC's requested waiver would increase the burden on the high-cost fund, would contravene important Congressional and Commission policies promoting competition in local exchange service and other telecommunications services markets, would potentially harm HTI and its local ratepayers by forcing it either to abandon facilities or to sell them at below-market prices, and would not provide customers on DHHL properties any

³⁷ SIC's affiliate, Sandwich Isles Broadband Services, "is licensed to provide telecommunications and broadband services throughout the state of Hawaii." <http://www.sandwichisles.com/SIBS.html> (viewed Feb. 26, 2013).

service offerings or opportunities that are not already available to them, but rather would restrict their choices. For all these reasons, the requested waiver is contrary to the public interest.

CONCLUSION

For the foregoing reasons, the Commission should deny SIC's Petition for Expedited Study Area Waiver.

Respectfully submitted,

/s/

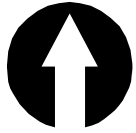
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March 4, 2013

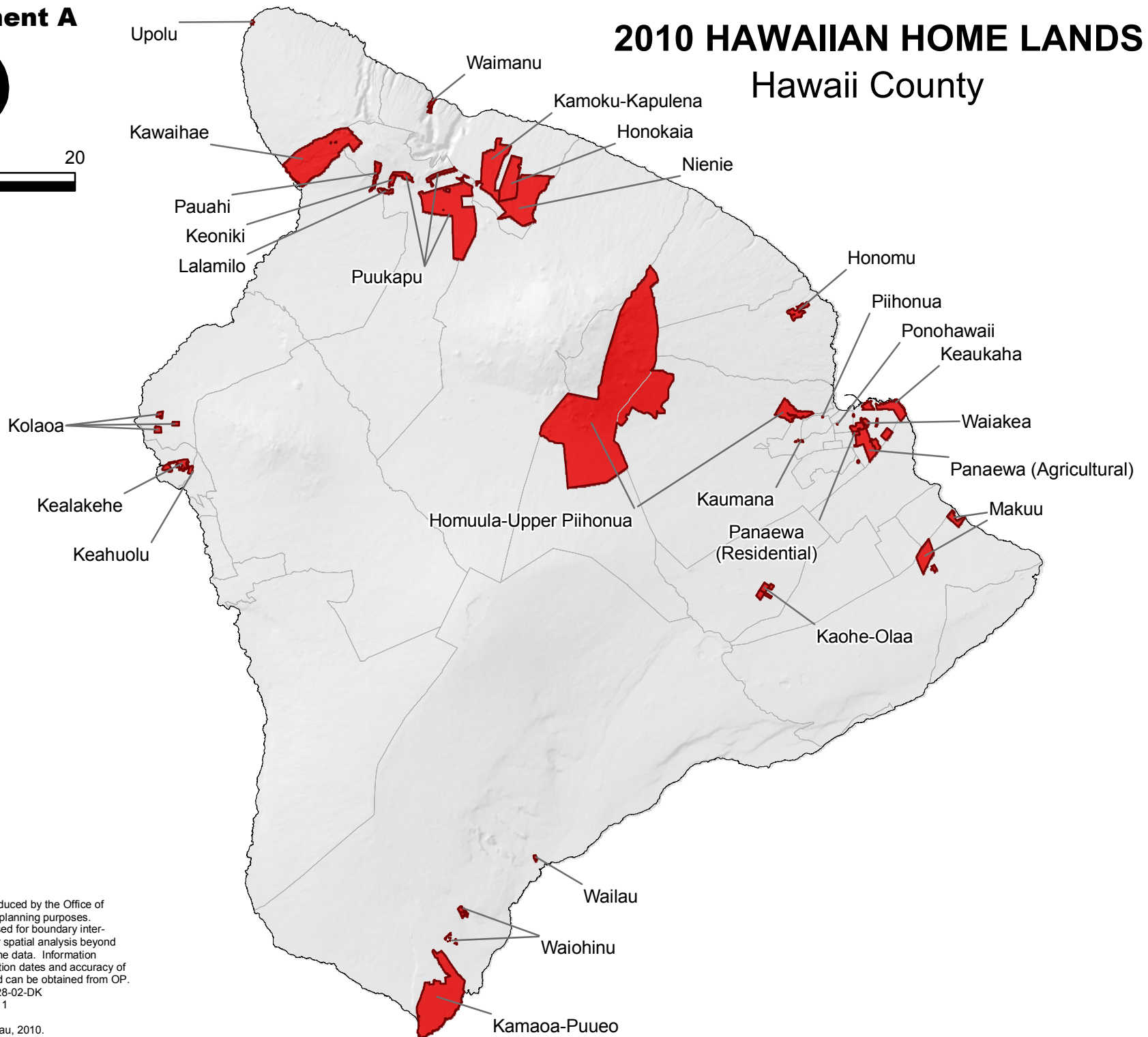
Attachment A

Attachment A



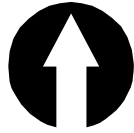
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2010 HAWAIIAN HOME LANDS Hawaii County



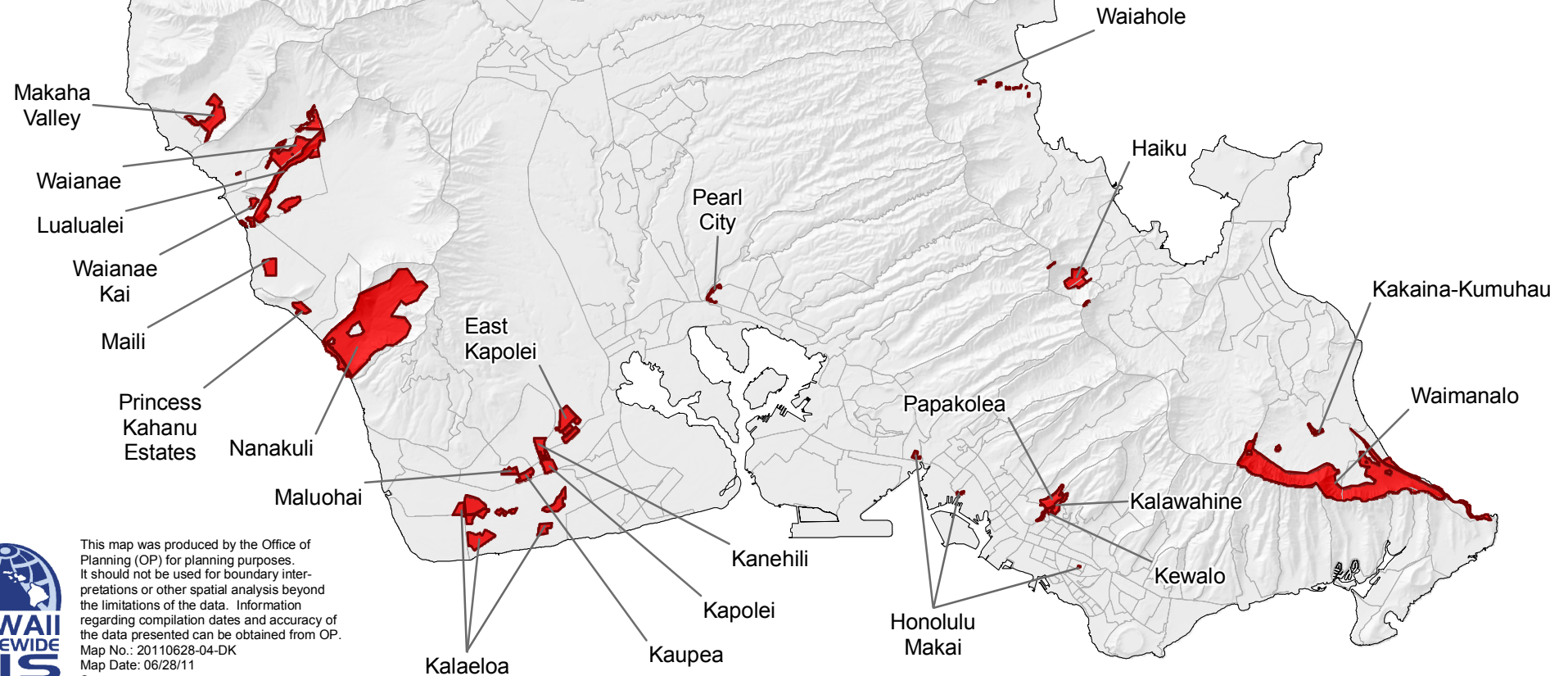
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Map No.: 20110628-02-DK
Map Date: 06/28/11
Sources:
U.S. Census Bureau, 2010.

Attachment A



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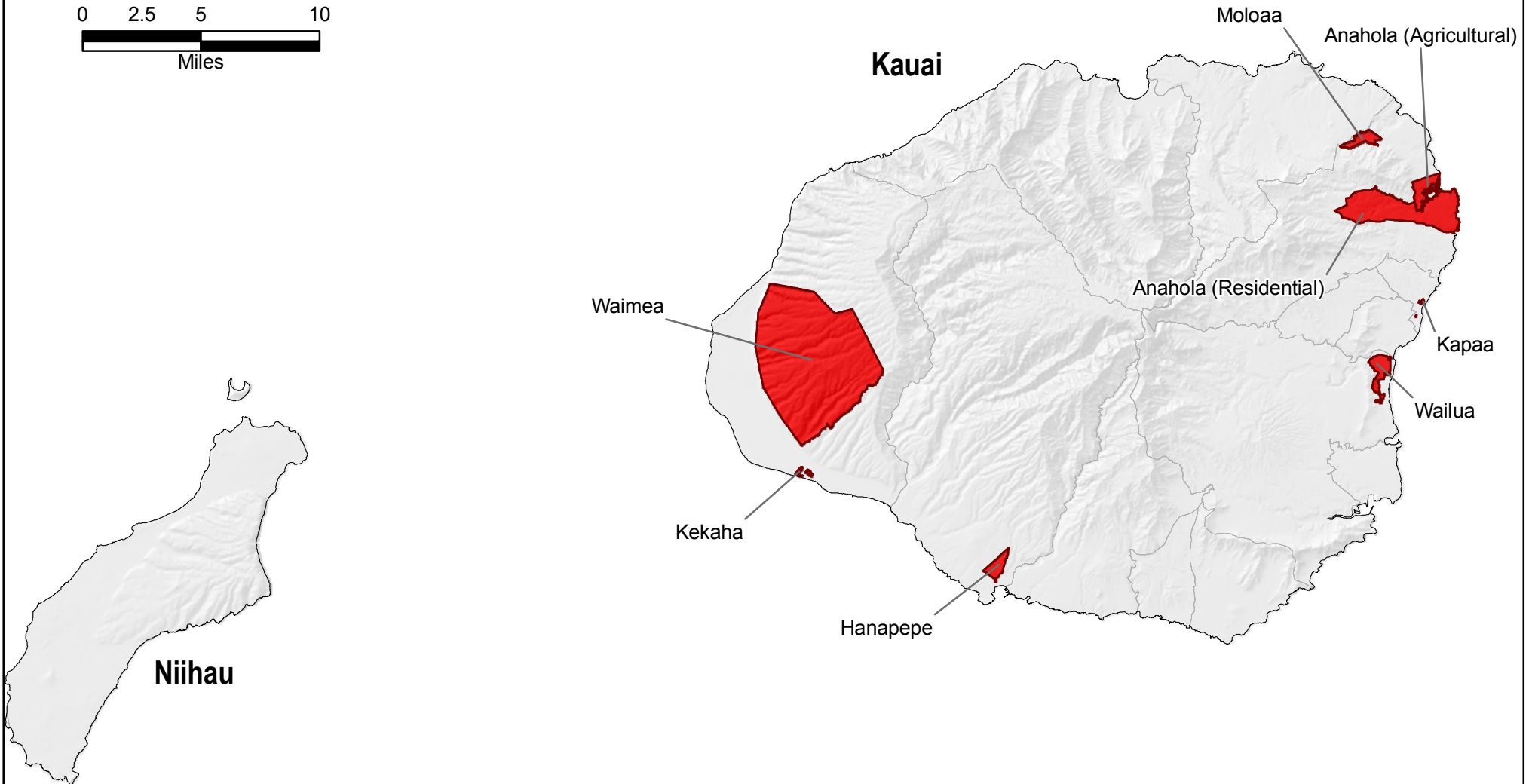
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Sources:
U.S. Census Bureau, 2010.

Attachment A



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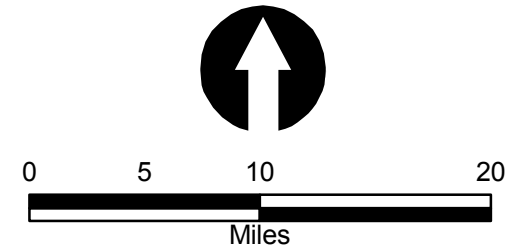
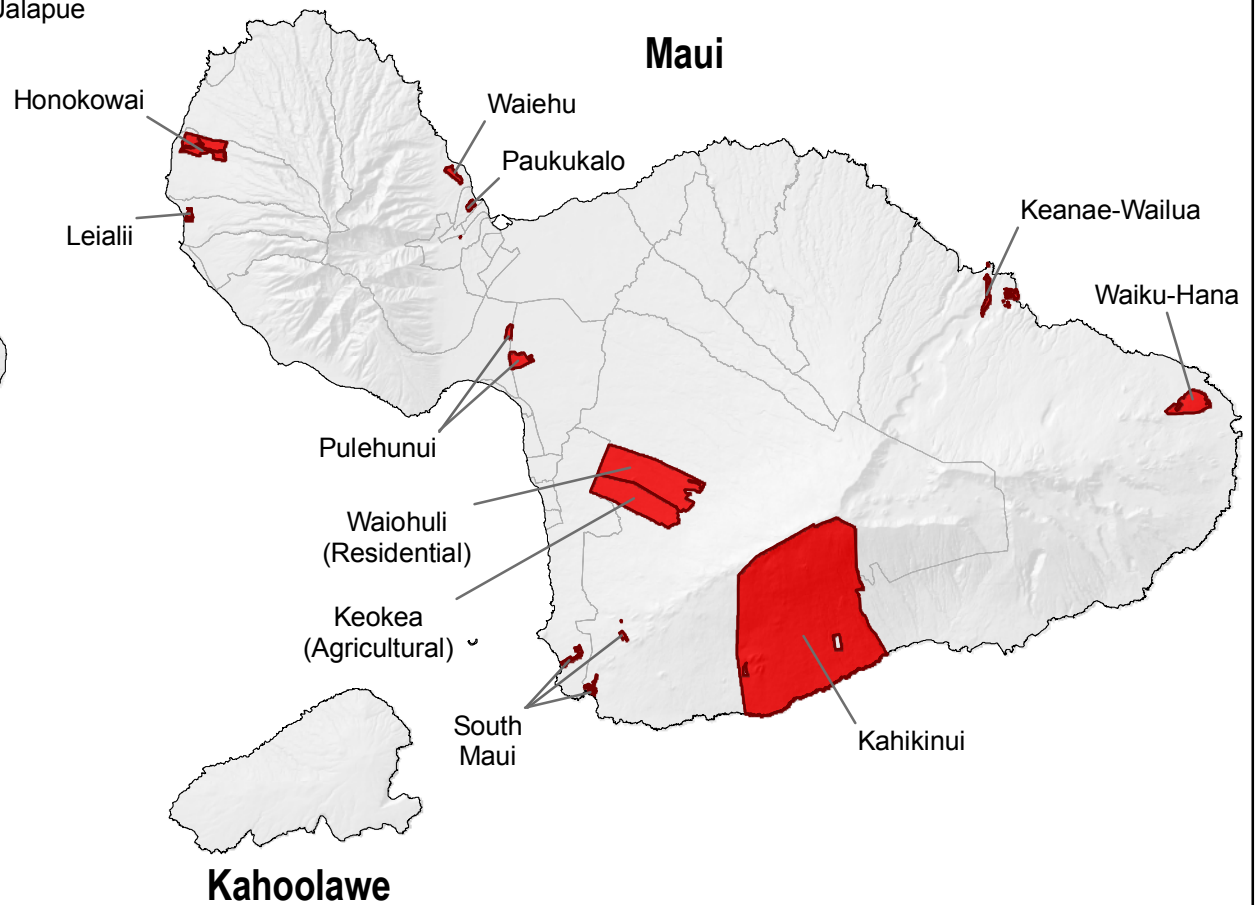
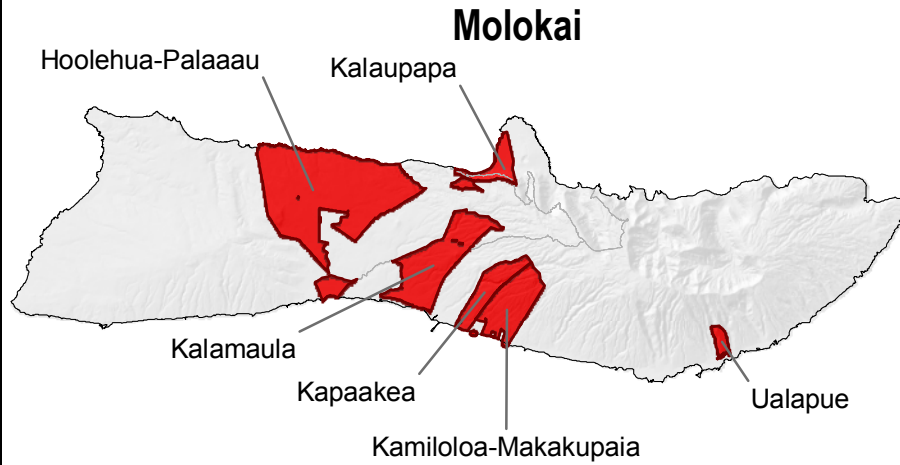
2010 HAWAIIAN HOME LANDS Kauai County



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Attachment A

2010 HAWAIIAN HOME LANDS Maui County



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Map No.: 20110628-05-DK
Map Date: 06/28/11
Sources:
U.S. Census Bureau, 2010.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Hawaiian Telcom, Inc.'s **Opposition of Hawaiian Telcom, Inc. to Petition for Expedited Study Area Waiver** in *In the Matter of Federal-State Joint Board on Universal Service, Sandwich Isles Communications, Inc. Petition for Waiver of the Definition of "Study Area" of the Appendix-Glossary of Part 36 of the Commission's Rules*, CC Docket No. 96-45, was submitted and served electronically on March 4, 2013, to the following recipients:

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